

**BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA**

In the Matter of:

LEE D. B.,

Claimant,

vs.

INLAND REGIONAL CENTER,

Service Agency.

OAH No. L 2006060484

**DECISION**

This matter was heard by Mark E. Harman, Administrative Law Judge of the Office of Administrative Hearings, in San Bernardino, California, on August 17 and 18, 2006.

Deborah Crudup, Program Manager, represented Inland Regional Center (Service Agency).

Lee D. B. (Claimant), who was not present, was represented by Andrea A. Rathburn, Deputy Public Defender.

The parties presented oral and documentary evidence. The record was left open until August 25, 2006, to allow the parties to submit written closing briefs. The Service Agency filed its brief on August 25, 2006, which was marked for identification as Exhibit 13. No brief was received from Claimant. The matter was deemed submitted for decision on August 25, 2006.

**ISSUE**

May the Service Agency terminate services being provided to Claimant under the Lanterman Act (the Act), e.g., Welfare and Institutions Code<sup>1</sup> section 4500 et seq.?

---

<sup>1</sup> All further references are to the Welfare and Institutions Code, unless specified otherwise.

## FACTUAL FINDINGS

1. Claimant is 25 years old. He was arrested in San Bernardino County, California, and charged with three counts of making criminal threats in early 2004. In October 2004, a question arose as to his competency to stand trial on these charges. The court appointed Michael E. Kania, Ph.D., to perform a psychological evaluation and to report whether Claimant was incompetent to stand trial. Dr. Kania administered intellectual tests. Based on the results of the tests, his interpretation of the results, a review of some records, and an interview of Claimant, Dr. Kania concluded that Claimant was incompetent to stand trial and, further, that his intellectual and adaptive functioning was in the range of mild mental retardation. The court then ordered additional examinations by a psychiatrist, Dr. Kurland, and the Service Agency. Dr. Kurland's impression was that Claimant was in the range of mild to moderate mental retardation.

2. Robert Zimmermann, Psy.D., a Service Agency staff psychologist, performed a psychological evaluation in January 2005. On the Reynolds Intellectual Assessment Scale, Claimant obtained a verbal intelligence score of 63 and a nonverbal intelligence score of 86. Dr. Zimmermann declined to give a composite intelligence score, due to significant variance in the subtest scores. Dr. Zimmermann offered a diagnosis of: Axis I: Major Depressive Disorder; Rule Out Malingering; and no diagnosis on Axis II. Dr. Zimmermann disagreed with Dr. Kania's conclusion, in part because Claimant had not been shown to have a developmental disability before the age of 18, and also because Dr. Kania had not administered any formal measures of adaptive functioning; whereas, Dr. Zimmermann tested Claimant's adaptive functioning and found it to be at the borderline average level in many areas. Dr. Zimmermann also believed that mental health conditions, other than intellectual limitations, were affecting Claimant's performance on IQ tests, such as Attention Deficit Hyperactivity Disorder, lack of sustained attention, depression or malingering; however, Dr. Zimmermann did not administer any measures of motivation or malingering during the evaluation.

3. In August 2005, a fourth court-ordered evaluation was performed by William H. Jones, Ph.D., who concluded that Claimant's intellectual and adaptive functioning was in the range of mild mental retardation, and that there was no indication of malingering. The court then found Claimant incompetent to stand trial and ordered the Service Agency to make a "placement" recommendation. The Service Agency then performed another assessment to determine whether Claimant was developmentally disabled and thus eligible for regional center services. Dr. Zimmermann continued to disagree with the conclusions of his three colleagues, and so informed the court.

4a. The Service Agency, relying on Dr. Zimmermann's assessment, notified Claimant of his right to appeal its determination that Claimant did not qualify for regional center services as a developmentally disabled person. Claimant filed a fair hearing request. That hearing was held in November 2005 before Administrative Law Judge James Ahler, who issued his decision on December 13, 2005, in which he concluded

Claimant was eligible to receive services based on a developmental disability “that involves a diagnosis of mental retardation or in the alternative, a developmental disability that is closely related to mental retardation.” (OAH No. L2005100475.)

4b. Judge Ahler relied not only on the opinions of Drs. Kania, Kurland and Jones, but also on the concurrence of Ron Russell, Ph.D., a school and clinical psychologist who evaluated Claimant at age 14 in 1995. Dr. Russell reviewed the recent test scores and concluded Claimant had a developmental disability, not inconsistent with his earlier findings. Judge Ahler discounted Dr. Zimmermann’s opinion because Dr. Zimmermann “did not discuss in any depth the impact of claimant’s cognitive disability, i.e., his inability solve problems with insight, his inability to adapt to new situations, or his inability to think abstractly and profit from personal experience. Dr. Zimmerman simply believed claimant’s cognitive condition did not involve a substantial handicap.”

5a. Claimant was admitted to Patton State Hospital (Patton) on December 9, 2005, as incompetent to stand trial. Here, he was evaluated by David M. Glassmire, Ph.D., ABPP, the director of Patton’s internship program in clinical psychology and a consultant, to assess Claimant’s level of intellectual ability and to rule out malingering. Dr. Glassmire concluded that Claimant did not meet criteria for mental retardation. He further opined that Claimant had both a factual and rational understanding of the criminal proceedings against him and an ability to consult with counsel in the presentation of a defense in a rational manner, and recommended that he be returned to court to stand trial.

5b. Dr. Glassmire administered the Wechsler Abbreviated Scale of Intelligence, Two-Subtest Version. Claimant obtained a Full Scale IQ estimate of 56, which falls in the extremely low range (<1st percentile). To assess motivation and the possibility of malingering, Dr. Glassmire administered the Dot Counting Test, the Rey Fifteen Item Test (FIT), the Test of Memory Malingering (TOMM), and the Validity Indicator Profile. The following chart shows Claimant’s performance on these tests:

<b>Instrument/Scale</b>	<b>Score</b>	<b>Interpretive Guideline</b>
Dot Counting Test	E Score = 34	Suspect Effort
Rey Fifteen Item Test (FIT)	Recall = 12	Valid Effort
Test of Memory Malingering (TOMM)	Trial 1 = 27 Trial 2 = 40 Retention Trial = 42	Suspect Effort
Validity Indicator Profile	N/A	Invalid/Irrelevant Response Curve

5c. Based on these results, Dr. Glassmire concluded that Claimant’s performances across measures of motivation and malingering indicated that he was not putting forth a valid effort during the testing. His performance on the Dot Counting Test indicated sub-optimal effort. He performed in the valid responding range on the FIT. On the TOMM, Claimant’s scores on Trial 2 and the Retention Trial “fell slightly below the empirically derived cutoff [of 45] for malingering.” Dr. Glassmire also found “patterned

responding,” in which Claimant alternated between lengthy strings of incorrect responses interspersed with lengthy strings of correct responses. He believes this may reflect an attempt to manipulate the result of the testing and is unlikely to result from a valid effort.

5d. Claimant’s performance curve on the Validity Indicator Profile indicated irrelevant responding, and his responses appeared to follow a regular pattern (e.g., 1212, 111222), tending to show Claimant did not put forth a consistent sustained effort to succeed during the current testing, or even to provide incorrect answers. According to Dr. Glassmire, “this type of responding is likely to result in significant underestimates of his intellectual abilities on concurrently administered intellectual measures.”

5e. Dr. Glassmire concluded that Claimant did not put forth a valid effort during the IQ testing. He further noted that a review of available records and observations by staff at Patton indicated that Claimant had not demonstrated any significant deficits in adaptive functioning since his admission to Patton, based on observations that Claimant “appears to be able to communicate with his peers, communicate on the telephone, follow the unit rules and routines when he wishes, and even play cards.” Dr. Glassmire offered a provisional diagnosis of Borderline Intellectual Functioning. He stated “in the absence of valid performance on intellectual testing in the future, this diagnosis should remain provisional.” Subsequently, the Patton staff determined Claimant to be competent to stand trial, and Claimant was returned to county jail under Penal Code section 1370, for the resumption of criminal court proceedings.

6. On May 23, 2006, the Service Agency sent notice to Claimant that it was closing Claimant’s case effective June 30, 2006, based on Dr. Glassmire’s evaluation. “This evaluation clearly states you do not merit a diagnosis of mental retardation nor do you have a condition similar to the [sic] mental retardation.” The Service Agency noted that it had not been able to provide services to Claimant because Claimant was residing either at Patton or in jail. Claimant requested a fair hearing. On July 31, 2006, following a hearing in the criminal case, the court again found Claimant mentally incompetent to stand trial, and ordered the Service Agency to examine Claimant and furnish a written report regarding “placement” to the court no later than August 30, 2006.

7. Dr. Glassmire believes the testing for motivation and malingering demonstrates Claimant’s “poor performance during previous intellectual evaluations likely resulted from sub-optimal effort rather than from a bona fide developmental disability.” This tends to discredit the previous tests administered by Drs. Kania, Jones and Russell and suggests they may have underestimated Claimant’s intellectual functioning. Dr. Glassmire, however, has not assessed Claimant’s actual intellectual abilities because he believes any test results will not be a valid indicator. Similarly, Dr. Zimmermann has rejected the intelligence tests administered by Drs. Kania, Jones and Russell for similar reasons, and has not projected a full scale IQ score. Dr. Glassmire’s opinion regarding Claimant’s motivation and malingering, while casting doubt on the previous testing, is not significantly different in substance or weight from the Service Agency’s evidence that Judge Ahler had reviewed in reaching his conclusions.

8. The Service Agency also has not presented evidence that tends to show that Claimant would not benefit from services and supports similar to those provided to mentally retarded persons. The new evidence highlights that there is a continuing conflict in the interpretation of testing data, but it fails to establish with sufficient concreteness that Claimant does not have a developmental disability, in order to make a finding that the original eligibility determination was clearly erroneous.

## LEGAL CONCLUSIONS

1. The Service Agency has the burden of proof as to each fact necessary to establish that Claimant is no longer eligible for services provided by the Service Agency.

2. Section 4512, subdivision (a), states:

"Developmental disability" means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

3. Section 4643.5, subdivision (b), provides as follows:

An individual who is determined by any regional center to have a developmental disability shall remain eligible for services from regional centers unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous.

4. The determination set forth in Judge Ahler's decision, that Claimant is developmentally disabled, has not been shown to have been clearly erroneous, as required by section 4643.5, subdivision (b), as set forth in factual finding numbers 1 through 8. The Service Agency has failed to point to specific elements of the previous psychological evaluations relied on by Judge Ahler were clearly erroneous. The Service Agency has not presented evidence of a comprehensive reassessment that clearly shows that Claimant does not have a developmental disability. The contention that previous testing was invalid, and that other mental health conditions may be the cause of Claimant's apparent deficits, essentially was the issue before Judge Ahler. Dr. Glassmire's opinion supports

this contention, but his opinion is not legally sufficient to show that the contrary opinions of Drs. Russell, Kania and Jones should not be accorded substantial weight in this proceeding. The Service Agency has not met its burden. Claimant remains eligible for regional center services due to mental retardation and/or the 5th category.

#### ORDER

Claimant's appeal, of the Service Agency's determination that he is no longer eligible for regional center services, is granted. The Service Agency shall provide services and supports as deemed necessary.

Dated: \_\_\_\_\_

\_\_\_\_\_  
MARK E. HARMAN  
Administrative Law Judge  
Office of Administrative Hearings

#### NOTICE

This is the final administrative decision in this matter and both parties are bound by this Decision. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.